



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB15**

**July 7, 2017**

**VIA U.S. MAIL AND EMAIL**

Gloria Markowitz  
Coalition Against the Milford School Tax  
8 East Thrush Drive  
Milford, DE 19963  
[davengloria@verizon.net](mailto:davengloria@verizon.net)

**Re: February 5, 2017 FOIA Petition Concerning the Milford School District Board of Directors and Citizens Budget Oversight Committee**

Dear Ms. Markowitz:

We write in response to your February 5, 2017 petition ("Petition") for a determination,<sup>1</sup> pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), of whether the Milford School District (the "District") Board of Directors (the "Board") and Citizens Budget Oversight Committee ("CBOC") violated FOIA's open meetings provisions. By letter dated February 10, 2017, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the District to submit a written response to the Petition. We received the District's initial response ("Initial Response") challenging the timeliness of your Petition on February 14, 2017. On March 2, 2017, we requested that the District address the merits of your Petition in a supplemental correspondence. We received the District's supplemental response ("Response Letter") on March 8, 2017. We have reviewed the Petition, the Initial Response, the Response Letter, and all supplemental correspondence. For the reasons set forth below, we conclude that the Board violated FOIA by failing to provide timely notice of its intent to discuss the Fiscal Year 2017 tax rate proposal at its June 20, 2016 meeting. We also conclude that the CBOC violated FOIA by failing to provide timely notice of its intent to discuss

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<sup>1</sup> We received your initial correspondence on January 29, 2017. However, in that correspondence, you stated that you had previously sent letters to multiple individuals concerning this matter. We requested that information, which you provided on February 5, 2017.

the Fiscal Year 2017 tax rate proposal at its June 14, 2016 meeting. To remediate these violations, we recommend that the Board and the CBOC pursue FOIA training.

### **RELEVANT FACTS**

The CBOC met on June 14, 2016.<sup>2</sup> The agenda for the meeting contained the following item: “Review and Discussion – Fiscal Year Tax Rate Proposal.”<sup>3</sup> No members of the public attended the meeting.<sup>4</sup> During the meeting, the District’s Chief Financial Officer, Sara Croce, presented the Fiscal Year 2017 tax rate proposal to the CBOC.<sup>5</sup> Ms. Croce stated that the proposal would be presented to the Board at the June 20, 2016 meeting.<sup>6</sup> She also stated that the tax proposal documents and county tax warrants would be posted to the District’s website once approved by the Board.<sup>7</sup>

The Board met on June 20, 2016.<sup>8</sup> The initial meeting agenda did not include any mention of the Fiscal Year Tax Rate Proposal.<sup>9</sup> On June 20, 2016, at some point prior to the start

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<sup>2</sup> Response Letter at Ex. 4.

<sup>3</sup> *Id.* at Ex. 3 p.1. The record does not reflect when the agenda was posted.

<sup>4</sup> *Id.* at Ex. 3. p. 2.

<sup>5</sup> *Id.* at Ex. 3 p. 2.

<sup>6</sup> *Id.* at Ex. 3 p. 2.

<sup>7</sup> *Id.* at Ex. 3 p. 2.

<sup>8</sup> *See id.* at Ex. 4. We note that the agenda included a 7:00 PM start time and an intent to adjourn into executive session. *Id.* at Ex. 1. However, the minutes reflect that the Board President called the meeting to order at 5:34 PM, took a roll call, and then convened an executive session from 5:35 PM until 7:05 PM. *Id.* at Ex. 4 p. 1. While the Petition did not specifically raise the issue, we remind the Board that “[t]he public is entitled to be present when the meetings are called to order and are permitted to observe and monitor the Board members’ votes with respect to whether to convene in executive session.” *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at \*8 (Mar. 26, 2013); *see also Del. Op. Att’y Gen.* 11-IB01 (Feb. 14, 2011) (“A public body may go into executive session only on a vote held at a public meeting.”). Indeed, the statute specifically provides that an executive session may be called “upon affirmative vote of a majority of members present at a meeting of the public body” and that “[t]he vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public.” 29 *Del. C.* § 10004(c). As such, we caution the Board to notice the appropriate start time on its agenda.

<sup>9</sup> *See* Response Letter at Ex. 1.

of the meeting,<sup>10</sup> the Board posted a full-page addendum to the agenda.<sup>11</sup> Among other items, the addendum included the following: “Fiscal Year 2017 Tax Rate proposal Action Item (Attachment No. 11).”<sup>12</sup> The addendum did not include an explanation as to why prior notice of the items contained therein could not be provided.<sup>13</sup> At least seven members of the public attended the meeting.<sup>14</sup> During the meeting, the Board voted unanimously to approve the Fiscal Year 2017 Tax Rate proposal.<sup>15</sup>

On July 1, 2016, the District sent notice of the Fiscal Year 2017 tax rate to the Kent County Receiver of Taxes and the Sussex County Receiver of Taxes.<sup>16</sup>

The Board met again on August 15, 2016.<sup>17</sup> You attended the meeting, along with at least seventeen other members of the public and a media representative.<sup>18</sup> During the meeting, Ms. Croce gave a detailed description of the components of the tax rate increase.<sup>19</sup> Several attendees spoke out against what they believed was a lack of transparency regarding the tax rate increase.<sup>20</sup>

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<sup>10</sup> The District stated that the Board posted the amended agenda “early in the afternoon.” *Id.* at 2.

<sup>11</sup> *See id.* at Ex. 2.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at Ex. 4 p. 1.

<sup>15</sup> *Id.* at Ex. 4 p. 7. While we recognize that FOIA only requires that minutes “include a record of those members present and a record . . . of each vote taken and action agreed upon,” 29 *Del. C.* § 10004(f), we note that the record does not reflect whether, or to what extent, the Board discussed the proposal before voting.

<sup>16</sup> Response Letter at Ex. 5 pp. 1-2.

<sup>17</sup> *See* Letter from Gloria Markowitz to Dr. Steven Godowsky dated August 20, 2016 at 2.

<sup>18</sup> *Id.*; Minutes of the August 15, 2016 Board Meeting at 1, located at [http://www.milfordschooldistrict.org/pdf/agendas\\_minutes/2016%20-%202017/081516%20Board%20Minutes.pdf](http://www.milfordschooldistrict.org/pdf/agendas_minutes/2016%20-%202017/081516%20Board%20Minutes.pdf) (last visited July 7, 2017).

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

On or about August 20, 2016, you sent a letter to Delaware Secretary of Education Dr. Steven Godowsky and, as noted in your January 29, 2017 correspondence, copied then-Governor Jack Markell, Matt Denn,<sup>21</sup> and then-United States Secretary of Education John King. In the letter, you stated that a neighbor had emailed you on August 11, 2016 about the school tax increase, at which point you checked online and noted that your own school tax had increased \$519.<sup>22</sup> You stated that you then contacted the Sussex County Tax Department, who informed you that the increase was due to a school referendum that had passed “last spring.”<sup>23</sup> You stated that a spring 2014 referendum had previously failed, but a spring 2015 referendum had indeed passed.<sup>24</sup> However, you estimated that the tax increase would have been \$280 based on the approximate figure that the media had reported.<sup>25</sup> You stated that you, along with approximately two dozen other individuals, attended the Board’s August 15, 2016 meeting, during which Ms. Croce stated that the Board approved the tax rate increase at an open Board meeting on June 20, 2016.<sup>26</sup> You stated that this “[s]lipped by without giving notice to the public” and noted that your Sussex County tax bill was mailed the next day.<sup>27</sup> You then appeared to challenge the legality of the vote outside of the FOIA context.<sup>28</sup>

Also in August 2016, you appeared to have attempted to file an electronic complaint regarding this matter with the American Civil Liberties Union of Delaware.<sup>29</sup> Your complaint raised the same allegations set forth more fully herein.

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<sup>21</sup> See Letter from Gloria Markowitz to Dr. Steven Godowsky dated August 20, 2016. Your correspondence was addressed to “Lieutenant Governor Matt Denn.” *Id.* at 5. However, at all times relevant to this determination, Mr. Denn served as the Attorney General of the State of Delaware. The Office of the Lieutenant Governor was vacant at this time. While you subsequently provided tracking information confirming delivery to the Carvel State Office Building on August 24, 2016, we note that the Office of the Attorney General and the Office of the Governor are located on separate floors of the Carvel State Office Building. As the Certified Mail Receipt is addressed to “Hon. Matt Denn, Lt. Gov, DE,” and we have no record of having received your August 20, 2016 letter in our Office, we believe that your correspondence may have been forwarded to the Office of the Governor rather than this Office.

<sup>22</sup> *Id.* at 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 3-4.

<sup>29</sup> See ACLU Complaint.

The taxes were collected by October 2016.<sup>30</sup>

We received your first correspondence alleging that the Board violated FOIA on January 29, 2017. We subsequently requested copies of the letters that you had sent to others concerning this matter, which you provided on February 5, 2017.

### **SUMMARY OF ARGUMENTS**

In your Petition, you alleged that the Board violated FOIA by: 1) adding an action item to the agenda as an addendum the day of its June 20, 2016 meeting, 2) failing to include a reason for the delay in posting this item, and 3) failing to properly identify the item as a tax rate change on the agenda. You also alleged that the CBOC violated FOIA by failing to post an agenda in advance of its June 14, 2016 meeting that included its intent to discuss the Fiscal Year 2017 tax rate increase. You allege generally that these actions constituted a deliberate attempt to hide the tuition tax rate increase from the public until after the Board approved it.

In its Initial Response, the District argued: “Because the challenged action was not brought to the attention of the Office of the Attorney General within 6 months of the alleged violation, the Office of the Attorney General should adhere to its consistent practice by declining to investigate this matter.”<sup>31</sup> In its Response Letter, the District acknowledged that the Board failed to provide notice in its original agenda of its intent to consider and take action on the tax rate increase.<sup>32</sup> The District noted that the tax rate was consistently presented to the Board for approval at its June meeting in prior years, but was not included on the original agenda for the June 20, 2016 meeting due to an oversight.<sup>33</sup> The District stated that the information was included in an addendum to the agenda, which it posted and placed on the District’s website early in the afternoon on June 20, 2016.<sup>34</sup> The District nevertheless acknowledged that the addendum did not include an explanation for the delay in posting.<sup>35</sup> The District also noted that the information was presented and discussed at the June 14, 2016 CBOC meeting, during which it was noted that the tax rate would be presented to the Board at the June 20, 2016 meeting.<sup>36</sup>

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<sup>30</sup> Response Letter at 4.

<sup>31</sup> Initial Response at 1-2.

<sup>32</sup> Response Letter at 1-2.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 2.

The District stated that the Board unanimously approved the tax rate increase at the June 20, 2016 Board meeting<sup>37</sup> and that the District provided notice to Kent and Sussex Counties on July 1, 2016.<sup>38</sup> The District stated that, “[c]onsistent with these notices, school taxes were levied and collected to fund the operations of the District, the debt service obligations of the District, the District’s share of minor capital improvement expenses, and the District’s obligation to pay tuition to other school districts.”<sup>39</sup> Specifically, “[t]he taxes were levied in July 2016, collected by October, 2016, and have been spent, or will be spent, to meet the District’s obligations.”<sup>40</sup> The District did not address your allegation that the CBOC violated FOIA by failing to post an agenda in advance of the June 14, 2016 CBOC meeting that included the CBOC’s intent to discuss the Fiscal Year 2017 tax rate increase.

### **RELEVANT STATUTES**

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.”<sup>41</sup> With few exceptions, all meetings of public bodies shall be open to the public.<sup>42</sup>

FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof.”<sup>43</sup> “The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . .”<sup>44</sup> However, “the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.”<sup>45</sup> “When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3-4.

<sup>41</sup> 29 Del. C. § 10002(g).

<sup>42</sup> See 29 Del. C. § 10004(a) (“Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.”).

<sup>43</sup> 29 Del. C. § 10004(e)(2).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

set forth on the agenda.”<sup>46</sup> An agenda is defined as including a “general statement of the major issues expected to be discussed.”<sup>47</sup>

FOIA permits Delaware citizens to “petition the Attorney General to determine whether a violation of [FOIA] has occurred or is about to occur.”<sup>48</sup> Any such “petition shall set forth briefly the nature of the alleged violation.”<sup>49</sup> FOIA also permits citizens to “challenge the validity . . . of any action of a public body by filing suit within 60 days of such action but in no event later than 6 months after the date of the action.”<sup>50</sup> “Any action taken at a meeting in violation of [FOIA] may be voidable by the Court of Chancery.”<sup>51</sup>

## DISCUSSION

### The Circumstances Warrant this Office’s Consideration of the Petition

As a general matter, and consistent with the statutory deadlines for bringing suit pursuant to 29 *Del. C.* § 10005(a),<sup>52</sup> this Office does not consider FOIA petitions alleging FOIA violations that occurred more than six months prior to our receipt of the petition.<sup>53</sup> We have noted that this is a general rule that we adhere to “for fairness and practical reasons.”<sup>54</sup> Importantly, though, we

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<sup>46</sup> 29 *Del. C.* § 100004(e)(5).

<sup>47</sup> 29 *Del. C.* § 10002(a).

<sup>48</sup> 29 *Del. C.* § 10005(e).

<sup>49</sup> *Id.*

<sup>50</sup> 29 *Del. C.* § 10005(a).

<sup>51</sup> *Id.*

<sup>52</sup> 29 *Del. C.* § 10005(a) (“Any citizen may challenge the validity under this chapter of any action of a public body by filing suit *within 60 days of the citizen’s learning of such action but in no event later than 6 months after the date of the action.*”) (emphasis added).

<sup>53</sup> See, e.g., *Del. Op. Att’y Gen.* 12-IB11, 2012 WL 5894039, at \*5 (Nov. 7, 2012); *Del. Op. Att’y Gen.* 16-IB14, 2016 WL 3462345, at \*2 (June 19, 2016); *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at \*10 n.3 (Aug. 29, 2005); *Del. Op. Att’y Gen.* 04-IB08, 2004 WL 771854, at \*2 (Mar. 9, 2004); *Del. Op. Att’y Gen.* 00-IB05, 2000 WL 1092970, at \*1 (Feb. 18, 2000); *Del. Op. Att’y Gen.* 97-IB23, 1997 WL 800821, at \*1 (Dec. 23, 1997); *Del. Op. Att’y Gen.* 94-IO16 (Apr. 7, 1994); *Del. Op. Att’y Gen.* 93-IO28 (Sept. 21, 1993); *Del. Op. Att’y Gen.* 93-IO06 (Mar. 5, 1993).

<sup>54</sup> *Del. Op. Att’y Gen.* 02-IB10 (Apr. 24, 2002). For example, we have previously noted the unfairness and uncertainty that would result if decisions made by public bodies, and upon which citizens and officials rely, could be challenged at any future time. See, e.g., *Del. Op. Att’y Gen.* 06-IB02, 2006 WL 1242011, at \*6 (Jan. 9, 2006) (citing *Wilmington Federation of*

are not bound by the time limitations set forth in 29 *Del. C.* § 10005(a).<sup>55</sup> Indeed, as we have previously stated, “[t]his Office has broad discretion in determining whether alleged open meeting violations have been timely asserted or otherwise warrant consideration.”<sup>56</sup> Notably, this Office was not made aware of your FOIA allegations until January 29, 2017. Nevertheless, the record reflects that you repeatedly attempted to bring this matter to various individuals’ attention in a timely manner. Importantly, the record also reflects that the Board was well aware of the allegations that its vote lacked sufficient transparency at least as early as August 15, 2016.<sup>57</sup> Finally, the District appears to have conceded at least one violation in connection with the Board’s June 20, 2016 vote.<sup>58</sup> While we cannot state with certainty whether these factors would be relevant to the Court’s analysis regarding the timeliness of your FOIA claims should you choose to pursue the matter in the Court of Chancery,<sup>59</sup> under these unique circumstances, we believe fairness dictates that we nonetheless issue a determination pursuant to 29 *Del. C.* §

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*Teachers v. Howell*, 374 A.2d 832, 836 (Del. 1977)); *Del. Op. Att’y Gen.* 12-IB11, 2012 WL 5894039, at \*6 n.7 (recognizing that our “long-standing policy, like the statutory limitations period in FOIA § 10005(a), reflects a balance of competing interests and goals” including fostering “finality and certainty” in governmental decisions).

<sup>55</sup> See *Del. Op. Att’y Gen.* 06-IB01, 2006 WL 1242008, at \*2 (Jan. 4, 2006) (“The sixty day/six month statute of limitations in Section 10005(a) applies only to suits a citizen may bring in Chancery Court. It does not apply to complaints under Section 10005(e) brought to the Attorney General’s office for administrative review.”); see also *Del. Op. Att’y Gen.* 97-IB23, 1997 WL 800821, at \*1 (noting that this Office is not bound by the time limitations set forth in 29 *Del. C.* § 10005(a) but exercising its discretion in concluding that petitioner’s delay of almost six months warranted a determination that the petition was untimely).

<sup>56</sup> *Del. Op. Att’y Gen.* 12-IB11, 2012 WL 5894039, at \*5 (citing *Del. Op. Att’y Gen.* 97-IB23, 1997 WL 800821, at \*1).

<sup>57</sup> Minutes of the August 15, 2016 Board Meeting at 2.

<sup>58</sup> See Response Letter at 3 (acknowledging that “the reasons for the delay in posting were not set forth on the addendum to the agenda”).

<sup>59</sup> See, e.g., *Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at \*9 (Del. Ch. Feb. 24, 2006) (“By its plain terms, § 10005 of FOIA reflects the General Assembly’s determination that FOIA claims must be filed promptly. This is made most obvious by the fact that the statute bars a claim filed after six months, even if the citizen did not learn of the public body’s action until after that period.”); *Lechlitter v. Del. Dep’t of Natural Res.*, 2015 WL 7720277, at \*4 (Del. Ch. Nov. 30, 2015) (“[T]he statute of repose as provided by 29 *Del. C.* § 10005(a) is six months.”); *Lechlitter v. Del. Dep’t of Natural Res.*, 2015 WL 9591587, at \*15 (Del. Ch. Dec. 31, 2015) (“I find that the Plaintiff’s failure to contest the alleged FOIA infractions within six months amounts to laches, by analogy to the statute of repose, and grant summary judgment in favor of the Defendants for the FOIA claims embedded in Count II.”).



10005(e) regarding the merits of your claims.<sup>60</sup> If our office had received your allegations at a time when it was possible to provide an opinion prior to the expiration of the 60-day statutory deadline for initiating a court action, we might have sought to do so on an expedited basis. However, as detailed above, the six-month period had already expired when we received the allegations.

#### The CBOC Violated FOIA by Failing to Notice its Intent to Discuss the Tax Rate Increase

As an initial matter, we conclude that the CBOC violated FOIA by failing to provide timely notice of its intent to discuss the Fiscal Year 2017 tax rate increase during its June 14, 2016 meeting. Notably, the Petition specifically alleged that the CBOC failed to post an agenda including discussion of the tuition tax rate increase prior to the June 14, 2016 meeting.<sup>61</sup> Although the District has provided a copy of the agenda for its June 14, 2016 meeting, which included the tax rate proposal, the District has failed to provide any evidence or argument that the CBOC posted timely notice of its meeting at the CBOC's principal office or, if no such office exists, at the place where the CBOC's meetings are regularly held.<sup>62</sup> Similarly, the District has failed to clarify whether or when the CBOC posted the agenda.<sup>63</sup> As the public body bears the burden of proof pursuant to 29 *Del. C.* § 10005(c), it is our determination that the CBOC violated FOIA by failing to provide sufficient notice of its intent to discuss the Fiscal Year 2017 tax rate proposal at its June 14, 2016 meeting.<sup>64</sup>

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<sup>60</sup> *Cf. Del. Op. Att'y Gen.* 12-IB11 (concluding that petitioner "provided us with no reason to deviate from our long-standing policy and practice").

<sup>61</sup> Petition ("Further, an Agenda including this item at the CBOC meeting was not posted prior to said CBOC meeting, in further violation of FOIA Open Meeting Laws mentioned above.").

<sup>62</sup> *See* 29 *Del. C.* § 10004(e)(4) ("Public notice . . . shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held . . .").

<sup>63</sup> *See* 29 *Del. C.* § 10004(e)(2) (providing that notice of regular meetings "shall include the agenda, if such has been determined at the time"); 29 *Del. C.* § 10004(e)(5) ("When the agenda is not available at the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.").

<sup>64</sup> *See* 29 *Del. C.* § 10004(e)(2) ("All public bodies shall give public notice of their regular meetings . . . at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . .").

The Board Violated FOIA by Failing to Provide  
Sufficient Notice of its Intent to Discuss and Vote Upon the Tax Rate Increase

Similarly, we conclude that the Board violated FOIA by failing to provide sufficient notice of its intent to discuss and vote upon the Fiscal Year 2017 Tax Proposal during its June 20, 2016 meeting. As this Office has previously observed:

The . . . agenda disclosure requirements are necessary to ensure that the public receives adequate advance notice of all important matters that will be discussed and voted upon at a public meeting. Without adequate disclosure, members of the public are unable to make informed decisions as to whether (or not) to attend particular public meetings to observe and monitor a public body's performance on matters of interest to them.<sup>65</sup>

We find it difficult to conceive of a matter of greater interest to a group of citizens than a proposal, which, if approved, would result in an increased tax burden on those citizens.

To be clear, FOIA does not prohibit a public body from amending its agenda under certain circumstances. Indeed, 29 *Del. C.* § 10004(e)(2) specifically provides that “the agenda shall be subject to change to include additional items including executive session or the deletion of items including executive sessions which arise at the time of the public body’s meeting.” However, “[c]itizens should not have to double check the agenda over and over to see whether the public body has added new matters of public business.”<sup>66</sup> As such, “[o]ur Office does not believe . . . that FOIA contemplates repeated or routine amending of agendas after the initial posting.”<sup>67</sup> Rather, a public body may amend a timely posted meeting agenda when the following conditions are met:

First, public bodies must publish an amended agenda describing adequately the new items ‘at least 6 hours in advance of the meeting.’ Second, public bodies must include in the amended agenda a brief statement describing the reasons for the delay in providing notice of any new agenda items. Finally, if . . . an amended agenda is filed less than 7 days in advance of the meeting, . . . public bodies [must] make an additional showing that each new matter of public business came up unexpectedly after the initial posting and required immediate attention.<sup>68</sup>

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<sup>65</sup> *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at \*7.

<sup>66</sup> *Del. Op. Att’y Gen.* 07-IB17, 2007 WL 4732800, at \*3 (July 10, 2007).

<sup>67</sup> *Id.*

<sup>68</sup> *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at \*10 (internal citations omitted).

Here, even assuming that the Board indeed amended the agenda at least six hours in advance of the meeting,<sup>69</sup> it is evident that it nonetheless failed to satisfy each of the remaining requirements. First, as the Board candidly admitted, the Board failed to include in its addendum a reason for the delay in providing notice of the Board's intent to discuss the Fiscal Year 2017 Tax Proposal.<sup>70</sup> This was a clear violation of 29 *Del. C.* § 10004(e)(5).<sup>71</sup> The Board has also failed to demonstrate that the matter arose unexpectedly *and* required immediate attention.<sup>72</sup> Even if we assume, without deciding, that the discussion and vote on the Fiscal Year 2017 Tax Proposal required immediate attention, it is clear that the matter did not arise unexpectedly.<sup>73</sup>

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<sup>69</sup> We note that the Board states the agenda was amended "early in the afternoon" of the June 20, 2016 meeting, which was scheduled to begin at 7:00 PM. *See* Response Letter at 2.

<sup>70</sup> *See id.* at 3.

<sup>71</sup> *See Del. Op. Att'y Gen.* 13-IB01, 2013 WL 2477025, at \*11 (school board did not state reasons why new matters were omitted from original agenda); *Del. Op. Att'y Gen.* 11-IIB08, 2011 WL 3013796, at \*2 (May 5, 2011) ("The amended agenda . . . did not contain an explanation for the late posting, in violation of 29 *Del. C.* § 10004(e)(5)."); *Del. Op. Att'y Gen.* 04-IB06 (Feb. 23, 2004) (school board violated FOIA by not providing explanation for delay in adding board election date to agenda); *Del. Op. Att'y Gen.* 03-IB20, 2003 WL 22669565, at \*3 (Sept. 3, 2003) (town violated FOIA by amending agenda without including explanation as to why the subject was not available at the time of the original notice); *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 1282812, at \*3 (May 21, 2002) (town council violated FOIA by amending agenda without including explanation for the delay); *Del. Op. Att'y Gen.* 00-IB07, 2000 WL 1092968, at \*6 (Apr. 28, 2000) (school board violated FOIA by amending agenda to include referendum nine hours before meeting without providing explanation as to why the issue could not have been included in the original agenda); *Del. Op. Att'y Gen.* 95-IB15, 1995 WL 794547, at \*3 (Mar. 24, 1995) (concluding that city council's failure to state reason for delay in posting revised agenda violated FOIA).

<sup>72</sup> *See Del. Op. Att'y Gen.* 12-IIB01, 2012 WL 1424509, at \*3 (Jan. 6, 2012) ("Even when a public body has complied with the six-hour agenda-amending provision of § 10004, our Office has repeatedly opined that, when a public body does amend an agenda for a public meeting after its initial posting, the public body has the burden to show *both* that: (1) the matter of public business came up unexpectedly after the initial posting; *and* (2) the matter requires the immediate attention of the public body and cannot be deferred to a later meeting whose posted agenda would provide at least seven days prior notice to the public.") (emphasis added).

<sup>73</sup> *Compare Del. Op. Att'y Gen.* 06-IB08, 2006 WL 1779486, at \*3 (Apr. 6, 2006) (concluding that school district did not violate FOIA by amending agenda to include bid specifications for a project received after the original meeting notice because deferring the matter until the next regularly-scheduled meeting would have delayed construction), *with Del. Op. Att'y Gen.* 05-IB15, 2005 WL 2334344, at \*3 (June 20, 2005) (concluding that city council violated FOIA by adding proposed subdivision item to agenda the day prior to the meeting because the issue arose more than seven days prior to the meeting and there was no evidence that it was such

For example, the Board remarked that, in prior years, the Board has discussed and voted upon tax rate increases at its June meetings.<sup>74</sup> Moreover, the Board noted that Ms. Croce discussed the matter during the June 14, 2016 CBOC meeting and stated that it would be presented to the Board at its June 20, 2016 meeting.<sup>75</sup> Finally, the Board stated that its failure to include the item in the first instance was due to an oversight.<sup>76</sup> Under the circumstances, it is our determination that the Board violated FOIA by failing to provide sufficient notice of its intent to discuss and vote upon the Fiscal Year 2017 Tax Proposal at its June 20, 2016 meeting.

FOIA's requirements for amendment of an agenda do not leave a public body without recourse if it makes an error in preparing an agenda and the matter cannot be deferred to a later date so that seven days' notice can be provided. For example, the statute allows for a separately noticed "special meeting" with its own set of notice requirements.<sup>77</sup> However, the Board here did not follow this statutory process.

The Board Did Not Violate FOIA by Failing to Identify  
the Fiscal Year 2017 Tax Rate Proposal as a Tax Rate Change

"An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting . . . ."<sup>78</sup> As noted above, FOIA requires that an agenda include "a general statement of the major issues expected to be discussed."<sup>79</sup> However, "[n]othing in FOIA, and importantly nothing in a common-sense reading of the statute in light of its purpose, requires

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a pressing matter that it could not be deferred to a later date), and *Del. Op. Att'y Gen.* 99-IB11, 1999 WL 1095337, at \*1 (June 25, 1999) (concluding that city council violated FOIA because issue of a budget amendment which was added to the agenda at the start of the meeting arose well prior to meeting and could have been included in the original agenda).

<sup>74</sup> Response Letter at 3.

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *Id.* at 3.

<sup>77</sup> See 29 *Del. C.* § 10004(e)(3). See, e.g., *Del. Op. Att'y Gen.* 05-IB23, 2005 WL 3991282, at \*3 (Aug. 15, 2005) (noting that, where the Sussex County Council failed to amend the agenda at least six hours in advance of the meeting and deferring discussion of a change order issue could have resulted in a default on the contract, "[the Council] could have noticed a special meeting (which only requires 24 hours notice under FOIA)"); *Del. Op. Att'y Gen.* 01-IB13, 2001 WL 1593113, at \*2 (Aug. 9, 2001) (noting that the committee could have noticed another regular meeting or a special meeting to address an issue that arose well prior to the meeting but was not included in the meeting agenda).

<sup>78</sup> *Del. Op. Att'y Gen.* 07-IB24, 2007 WL 4913657, at \*3 (Dec. 27, 2007) (citing *Del. Op. Att'y Gen.* 05-IB11, 2005 WL 1209241, at \*2 (Apr. 11, 2005)).

<sup>79</sup> 29 *Del. C.* § 10002(a).

public notice to provide every alternative that may take place with respect to a specific subject under consideration.”<sup>80</sup> Under the circumstances, we believe it was clear that the purpose of the Board’s consideration of the “Fiscal Year 2017 Tax Rate proposal” as an action item at its June 2016 meeting was to inform a vote by the Board either approving or denying the proposal.<sup>81</sup> Similarly, we believe that any tax rate proposal might include a change in the tax rate. Finally, the record suggests that if the Board had voted to deny the proposal it would not have impacted the tax rate. As such, it is our determination that the Board did not violate FOIA, as alleged, by failing to identify the Fiscal Year 2017 Tax Rate Proposal as a tax rate change.

### **REMEDATION**

As discussed above, you have requested relief that only a court can grant. For example, you have requested that the vote to approve the tuition tax rate increase should be deemed null and void. You also argue that the Milford School District should be compelled to halt any future collections and to refund all prior payments. While this Office can express a legal opinion regarding the validity of the June 20, 2017 vote, it is not vested with the authority to specifically invalidate the vote, halt the collection of taxes, or order a refund to taxpayers.

Under the circumstances, however, we strongly encourage the CBOC and the Board to take certain steps to seek clarification regarding the letter and spirit of FOIA, and to ensure its ongoing compliance therewith. At the very least, we encourage the CBOC and the Board to pursue FOIA training. Additionally, while we note that 29 *Del. C.* § 10007(d) dictates that these materials “shall not be construed as legal advice,” the Committee may wish to consult the existing Attorney General FOIA Opinions, the current Policy Manual for FOIA Coordinators, and the slides and video from the most recent Statewide FOIA Coordinator Training. As of the date of this determination, those materials can be found here: <http://attorneygeneral.delaware.gov/executive/open-government/>.

### **CONCLUSION**

Based upon the foregoing, it is our determination that the Milford School District CBOC violated FOIA by failing to provide sufficient notice of its intent to discuss the Fiscal Year 2017 tax rate proposal at its June 14, 2016 meeting. In addition, the Milford School District Board of Directors violated FOIA by failing to provide sufficient notice of its intent to discuss and vote upon the matter at its June 20, 2016 meeting. However, this Office does not have the statutory authority to invalidate the CBOC or Board’s actions.


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<sup>80</sup> *Lechlitter v. Becker*, 2017 WL 117596, at \*2 (Jan. 12, 2017)) (citing *Del. Op. Att’y Gen.* 06-IB09, 2006 WL 1779490 (Apr. 25, 2006)).

<sup>81</sup> *See Lechlitter*, 2017 WL 117596, at \*2 (concluding that “presentation and consideration” of an amendment to a land lease was sufficient to put the public body on notice that the public body might vote on the amendment).

While this Office will take no further action to invalidate the Board's June 20, 2016 vote,<sup>82</sup> we wish to remind you that you retain an absolute right to file suit.<sup>83</sup>

Very truly yours,

  
Michelle E. Whalen  
Deputy Attorney General

Approved:

  
Ilona Kirshon, Deputy State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)  
Aaron R. Goldstein, State Solicitor (via email)  
James McMackin, Esq. (via email)

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<sup>82</sup> See *Del. Op. Att'y Gen.* 08-IB04, 2008 WL 1727612, at \*2 (Feb. 20, 2008) ("Because of the lapse of time, and DSU's reliance on the budget passed at the June 28, 2007 meeting, the Attorney General would undoubtedly be unable to obtain a court order invalidating the DSU FY08 budget. For that reason, the Attorney General will not take any action to invalidate the June 28, 2007 meeting of the Board of Trustees of Delaware State University.") (internal citations omitted).

<sup>83</sup> 29 *Del. C.* § 10005(e) ("The citizen shall have the absolute right to file suit regardless of the determination of the Attorney General . . .").